

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE BANK OF AMERICA CORP.
SECURITIES, DERIVATIVE, AND
EMPLOYEE RETIREMENT INCOME
SECURITY ACT (ERISA) LITIGATION
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Master File
No. 09 MD 2058 (PKC)

ECF Case

THIS DOCUMENT RELATES TO
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Consolidated Derivative Action
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**DECLARATION OF LAWRENCE PORTNOY, ESQ.
IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT**

I, Lawrence Portnoy, declare as follows:

1. I am a partner of the law firm of Davis Polk & Wardwell LLP, counsel for the individual defendants (“Defendants”) in the above-captioned action, and am admitted to practice before this Court.

2. I submit this Declaration in support of final approval of the proposed Settlement.

3. As of the date of this Declaration, the parties have not reached any agreement or understanding regarding any amount of attorneys’ fees and expenses for Lead Plaintiffs’ counsel.

4. Attached are true and correct copies of the following documents:

Exhibit A: Stipulation and Agreement of Compromise, Settlement and Release, dated June 19, 2012, including exhibits thereto;

Exhibit B: Affidavit of Lawrence Portnoy, dated Apr. 27, 2012 (without supporting exhibits);

- Exhibit C: Excerpt from Transcript of Delaware Deposition of William Barnet (Oct. 11, 2011);¹
- Exhibit D: Excerpts from Transcript of Delaware Deposition of Frank P. Bramble, Sr. (June 21, 2011);
- Exhibit E: Excerpts from Transcript of Delaware Deposition of Gary Countryman (June 14, 2011);
- Exhibit F: Excerpts from Transcript of Delaware Deposition of General Tommy Franks (Oct. 4, 2011);
- Exhibit G: Excerpt from Transcript of SDNY Deposition of Charles Gifford (Dec. 8, 2011);
- Exhibit H: Excerpts from Transcript of Delaware Deposition of Kenneth D. Lewis (Mar. 6, 2012);
- Exhibit I: Excerpts from Transcript of SEC Deposition of Kenneth D. Lewis (Oct. 30, 2009);
- Exhibit J: Excerpt from Transcript of SDNY Deposition of Thomas J. May (Dec. 21, 2011);
- Exhibit K: Excerpt from Transcript of Delaware Deposition of Eric Roth (Jan. 19, 2012);
- Exhibit L: Excerpts from Transcript of Delaware Deposition of Thomas M. Ryan (Oct. 6, 2011);
- Exhibit M: Excerpt from Transcript of Delaware Deposition of O. Temple Sloan, Jr. (Oct. 19, 2011);
- Exhibit N: Excerpt from Transcript of Delaware Deposition of Jacquelyn M. Ward (June 10, 2011);
- Exhibit O: Jonathan D. Glater, *Oracle's Chief in Agreement to Settle Insider Trading Lawsuit*, N.Y. Times, Sept. 12, 2005, at C1;
- Exhibit P: Exhibit 3.A to the Bank of America Form 10-K for the period ended Dec. 31, 2007 (Amended and Restated Certificate of Incorporation of Registrant) (filed with the SEC on Feb. 28, 2008);

¹ “Delaware Deposition” refers to testimony taken in the parallel derivative action pending in the Delaware Court of Chancery. “SDNY Deposition” refers to testimony taken in this Action. “SEC Deposition” refers to testimony taken in *Securities and Exchange Commission v. Bank of America*, No. 09 Civ. 6829 (S.D.N.Y.).

- Exhibit Q: Minutes of the Special Meeting of the Board held on Sept. 14, 2008, bearing Bates numbers UR-BAC-ML-NYAG00003747 to UR-BAC-ML-NYAG00003761;
- Exhibit R: Christine Harper & Serena Saitto, *Firms Still Setting Aside Billions for Bonuses*, N.Y. Times, Oct. 27, 2008, available at <http://www.nytimes.com/2008/10/27/business/worldbusiness/27iht-bonus.4.17288499.html>;
- Exhibit S: Relevant excerpt of Form DEFM14A (Merger Proxy Statement), dated Oct. 31, 2008 (filed jointly by BAC and Merrill with the SEC on Nov. 3, 2008);
- Exhibit T: Affidavit of Karl L. Cambronne in Support of Preliminary Approval, *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, Master File No. 06-1216 (D. Minn. Nov. 14, 2008), and Exhibit B thereto;
- Exhibit U: Bradley Keoun & Jacqueline Simmons, *Merrill Said to Cut Bonuses by 50% as Revenue Slumps*, Bloomberg, Dec. 3, 2008, available at <http://www.bloomberg.com/apps/news?pid=21070001&sid=aqSGYyeo7e4g>;
- Exhibit V: Historical stock price data for Bank of America on December 2 and December 3, 2008 (obtained from Yahoo! Finance on November 2, 2012);
- Exhibit W: Relevant excerpt of Plaintiff's Memorandum in Support of Its Motion for Approval of Settlement and an Award of Attorneys' Fees and Costs, *Teachers' Ret. Sys. v. Greenberg, et al.*, C.A. No. 20106-VCS (Del. Ch. Dec. 9, 2008);
- Exhibit X: Minutes of the Special Meeting of the Board held on Dec. 22, 2008, bearing Bates numbers BAC-ML-NYAG-502-00001125 to BAC-ML-NYAG-502-00001128;
- Exhibit Y: Relevant excerpt of Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement of Derivative Action, *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, Master File No. 06-1216 (D. Minn. Jan. 30, 2009);
- Exhibit Z: Relevant excerpt of the Bank of America Form DEF 14A (Annual Proxy Statement) for the period ended Apr. 29, 2009 (filed with the SEC on Mar. 18, 2009);
- Exhibit AA: Order, *Cunniff v. Lewis, et al.*, No. 09 CVS 3978 (N.C. Super. Ct. Oct. 6, 2009);

- Exhibit BB: Relevant excerpt of Memorandum of Points and Authorities in Support of Joint Motion for Final Approval of Partial Settlement, *In re Broadcom Corp. Derivative Litig.*, Master File No. CV06-3252R (C.D. Cal. Nov. 2, 2009);
- Exhibit CC: Relevant excerpt of Memorandum of Plaintiff Securities and Exchange Commission in Support of Entry of Proposed Consent Judgment, *SEC v. Bank of America Corp.*, Nos. 09 Civ. 6829 & 10 Civ. 215 (S.D.N.Y. Feb. 4, 2010);
- Exhibit DD: Relevant excerpt of the Bank of America Form 10-K for the period ended Dec. 31, 2009 (filed with the SEC on Feb. 26, 2010);
- Exhibit EE: Relevant excerpt of Plaintiffs' Memorandum in Support of Their Motion for Approval of Settlement and an Award of Attorneys' Fees and Expenses, *Am. Int'l Group, Inc. Consol. Derivative Litig.*, C.A. No. 769-VCS (Del. Ch. Dec. 17, 2010);
- Exhibit FF: Relevant excerpt of Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Derivative Litigation Settlement and Award of Attorneys' Fees and Reimbursement of Expenses, *In re Pfizer Inc. S'holder Derivative Litig.*, No. 09 Civ. 7822 (S.D.N.Y. Feb. 7, 2011);
- Exhibit GG: Declaration of Layn R. Phillips, dated April 27, 2012;
- Exhibit HH: Order, *In re Bank of America Corp. S'holder Derivative Litig.*, C.A. No. 4307-CS (Del. Ch. May 9, 2012);
- Exhibit II: Redacted version of Individual Defendants' Brief in Support of Motion for Summary Judgment, *In re Bank of America Corp. S'holder Derivative Litig.*, C.A. No. 4307-CS (Del. Ch. Apr. 20, 2012) (filed on public docket on Apr. 25, 2012);
- Exhibit JJ: Order Setting Schedule and Preliminarily Approving Proposed Settlement, *In re Bank of America Corp. Sec., Derivative, & ERISA Litig.*, No. 09 MD 2058 (S.D.N.Y. July 13, 2012);
- Exhibit KK: Order, *In re Bank of America Corp. Sec., Derivative, & ERISA Litig.*, No. 09 MD 2058 (S.D.N.Y. Aug. 2, 2012);
- Exhibit LL: Bank of America Form 8-K, attaching press release dated Sept. 28, 2012 (filed with the SEC on Sept. 28, 2012);
- Exhibit MM: Martha Graybow & Rick Rothacker, *UPDATE4-BofA Pays \$2.4 Bln to Settle Claims Over Merrill*, Reuters, Sept. 28, 2012 (obtained from Westlaw);

- Exhibit NN: Press release, dated Oct. 12, 2012, entitled “Saxena White P.A. and Kahn Swick & Foti, LLC Announce the Proposed Settlement of the Bank of America Corp. Stockholder Derivative Litigation”;
- Exhibit OO: Affidavit of Publication of *Investor’s Business Daily*, dated Oct. 12, 2008, with accompanying tear sheet of advertisement;
- Exhibit PP: Affidavit of Publication of *The Wall Street Journal*, dated Oct. 15, 2012, with accompanying tear sheet of advertisement;
- Exhibit QQ: Declaration of Professor Anil Shivdasani, dated Nov. 1, 2012, with accompanying Expert Report and appendices and exhibits thereto; and
- Exhibit RR: Declaration of Jose C. Fraga Regarding Settlement Website and Toll Free Helpline, dated Nov. 2, 2012.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
November 6, 2012

s/ Lawrence Portnoy

Lawrence Portnoy
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